BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL T. MEDLOCK	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,034,962
JIFFY LUBE	)	
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the August 6, 2007 Order For Medical Treatment of Administrative Law Judge Brad E. Avery. The Administrative Law Judge (ALJ) granted claimant medical treatment with Michael T. McCoy, M.D., including knee replacement, and ordered it paid by respondent. The ALJ found that claimant aggravated a preexisting arthritis condition as a result of a March 26, 2007 work-related accident, even though the arthritis condition was not caused by the accident. The ALJ noted that the recommendation for knee replacement was not made until after claimant's March 26 accident occurred.[1]

Claimant appeared by his attorney, Sally G. Kelsey of Lawrence, Kansas. Respondent and its insurance carrier appeared by their attorney, Frederick J. Greenbaum of Kansas City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held on August 2, 2007, with attached exhibits; and the documents filed of record in this matter.

[1] Award at 1.

ISSUE

Respondent raises the following issue in its Request For Board Review: "The treatment ordered does not relate to the personal injury by accident alleged."[2]

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Order For Medical Treatment should be affirmed.

Claimant worked as a lower bay technician for respondent. His duties included performing oil changes, emptying trash, sweeping, mopping and disposing of oil filters.[3] In the performance of his job duties, claimant typically would go up and down stairs 25 to 30 times a day.[4]

Claimant suffered a left knee injury on March 26, 2007, while working for respondent. At that time, he had worked for respondent for approximately one year. The accident occurred when claimant was carrying two five-gallon buckets of oil filters up the stairs. Claimant had oil on his feet and, while starting up the steps, he stepped the wrong way, and he felt his knee "kind of twist" and he heard a pop. Claimant stood there for a minute, holding onto the rail, before resuming his work. In the year that he worked at respondent, claimant had never had knee symptoms of popping or pain.

Claimant reported the accident, and respondent sent claimant for medical treatment. Claimant initially went to First Med. He was sent for an MRI on his knee and then he was told to go see an orthopedic surgeon. Claimant saw Michael T. McCoy, M.D., on April 9, 2007.[5] In Dr. McCoy's April 9 office note, it states that x-rays showed osteoarthritis of the lateral compartment. The MRI confirmed this, but the MRI did not show any evidence of a meniscal tear. Dr. McCoy injected claimant's left knee with Kenalog (an anti-inflammatory), prescribed physical therapy and instructed claimant not to return to work until he was seen for a recheck appointment in a week.

Claimant began the physical therapy at Lawrence Rehab on April 12, 2007. It appears, from a review of the records, that claimant attended physical therapy for about

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[2] Request For Board Review at 1.

[3] P.H. Trans. at 6.

[4] P.H. Trans. at 7.

[5] P.H. Trans., Cl. Ex. 1.

two weeks, with the last time being April 25, 2007.[6] The physical therapy did not help alleviate claimant's symptoms.

When claimant returned to Dr. McCoy on April 14, 2007, Dr. McCoy noted that claimant was doing better. Again, Dr. McCoy stated that claimant had osteoarthritis, but that there was no evidence of a meniscal tear. He instructed claimant to continue with physical therapy and return in one week.

On April 25, 2007, claimant again saw Dr. McCoy. Dr. McCoy released claimant to return to work on Monday, but ordered claimant to continue using anti-inflammatories.

On May 9, 2007, claimant saw Dr. McCoy again. Claimant reported the cortisone injection did not help. Claimant received an injection of Aristospan, which is an anti-inflammatory. Dr. McCoy advised claimant that the only other option would be a total knee replacement.[7]

On May 22, 2007, claimant returned to Dr. McCoy. Dr. McCoy indicated that claimant's knee was looking the best he had seen it look. Dr. McCoy reported that the x-rays showed no evidence of meniscal tears, but did show osteoarthritis. Dr. McCoy noted in the May 22, 2007 report that claimant has had osteoarthritis for a long time and that that condition was aggravated by his March 26, 2007 injury at work.[8]

In a medical release dated May 22, 2007, Dr. McCoy allowed claimant to return to work that same day.[9] Claimant testified that the day before Dr. McCoy released claimant, he asked Dr. McCoy what his options were. Dr. McCoy told claimant that he could either live with the knee pain and receive cortisone shots, or he could have a total knee replacement. In Dr. McCoy's office note of May 22, 2007, it states that claimant's three options were that he could live with the pain; he could live with it and receive cortisone shots; or he could have a total knee replacement.[10]

On May 27, 2007, claimant called Dr. McCoy's office requesting a return to work form and something in writing regarding Dr. McCoy's total knee replacement recommendation. As indicated in that May 27 note, a member of Dr. McCoy's staff told claimant that a total knee replacement was not recommended, but that it was listed as an

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[6] P.H. Trans., Resp. Ex. A.

[7] P.H. Trans., Resp. Ex. A.

[8] P.H. Trans., Resp. Ex. A.

[9] P.H. Trans., Resp. Ex. A.

[10] P.H. Trans., Resp. Ex. A.

option. This staff member also told claimant the total knee replacement would need to be done under his private insurance, not workers compensation.[11]

In a May 24, 2007 letter to respondent's insurance company, Dr. McCoy again noted no evidence of meniscal damage. Dr. McCoy went on to state "I think the etiology of his osteoarthritis is from problems he has had for a long time. The knee replacement is definitely due to osteoarthritis."[12]

Claimant has a history of prior injuries to his left knee. On August 1, 1982, claimant sustained injuries in a car accident, including an injury to his left knee. He received treatment from William A. Bailey, M.D., and John J. Wertzberger, M.D., for those injuries. Claimant was later referred to Dr. McCoy. Dr. McCoy performed an arthroscopic examination on claimant's left knee on May 4, 1987. The procedure revealed fissures in the patella. Claimant's post-surgery diagnosis was chondromalacia plus medial parapatella plaque. On May 6, 1987, Dr. McCoy reported that claimant had chondromalacia of the patella.

Claimant suffered an injury to his left knee while in prison. He was kicked in the knee while playing basketball. Claimant testified that this was about 25 years ago. (According to the medical records from Dr. Wertzberger, this injury occurred in 1984.) Claimant was struck on the medial aspect of the left knee, experiencing instability and significant swelling at the time of injury. He received treatment, but did not have surgery.

Claimant injured his left knee in a motorcycle accident on July 14, 1990. Hospital records indicate that subsequent to that accident, claimant complained "very bitterly of extreme pain and tenderness of his left knee and there was notation of some swelling."[13] Claimant received treatment following this accident. At some point, he saw Dr. McCoy. Dr. McCoy diagnosed claimant with possible chondromalacia and possible meniscal tear. When claimant's condition did not improve, claimant was scheduled for arthroscopic surgery. On November 15, 1991, claimant underwent an arthroscopic partial medial meniscectomy, left knee, and arthroscopic lateral retinacular release, left knee. Upon discharge from the hospital on November 16, 1991, his diagnosis was chondromalacia of the left knee. Claimant went through four weeks of physical therapy. After that, claimant had no symptoms. Dr. McCoy released claimant in 1991.

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[11] P.H. Trans., Cl. Ex. 1.

[12] P.H. Trans., Resp. Ex. A.

[13] P.H. Trans., Resp. Ex. A. (July 19, 1990 note from C. H. Yorke, M.D.)

After the release in 1991, claimant worked for concrete companies for several years as a laborer. The last time claimant saw Dr. McCoy prior to April 9, 2007, was in 1991.[14] Claimant had no knee problems until the 2007 accident. Claimant's current symptoms are pain and swelling in the knees.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[15]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[16]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[17]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[18]

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[14] P.H. Trans. at 18.

[15] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[16] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[17] K.S.A. 44-501(a).

[18] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.[19]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[20]

Kansas workers compensation law is clear regarding a claimant's entitlement to benefits where a work injury aggravates, accelerates or intensifies a pre-existing condition. There is no doubt that claimant suffered a work-related injury while working for respondent. There is no doubt that claimant had a pre-existing condition in his left knee. This Board Member finds the medical opinion of Dr. McCoy supports a finding that claimant aggravated his left knee condition when he twisted his left knee on March 26, 2007. The need for a total knee replacement is, at least in part, associated with that injury. Therefore, for preliminary hearing purposes, the Order For Medical Treatment issued by the ALJ on August 6, 2007 should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[21] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven, for preliminary hearing purposes, that he aggravated his left knee condition as a result of the injury suffered on March 26, 2007, leading, at least in part, to the need for a total knee replacement.

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[19] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[20] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[21] K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Medical Treatment of Administrative Law Judge Brad E. Avery dated August 6, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October, 2007.

BOARD MEMBER

c: Sally G. Kelsey, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge